



**DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT**

**24 CFR Part 985**

**[Docket No. FR-5532-F-02]  
RIN 2577-AC76**

**Revision to the Section 8 Management Assessment Program Lease-Up Indicator**

**AGENCY:** Office of the Assistant Secretary for Public and Indian Housing, HUD.

**ACTION:** Final rule.

**SUMMARY:** This final rule amends HUD's regulations for the Section 8 Management Assessment program (SEMAP), by revising the process by which HUD measures and verifies performance under the SEMAP lease-up indicator. Specifically, HUD amends the existing regulation to reflect that assessment of a public housing agency's (PHA) leasing indicator will be based on a calendar year cycle, rather than a fiscal year cycle, which would increase administrative efficiencies for PHAs. This rule also clarifies that units assisted under the voucher homeownership option or occupied under a project-based housing assistance payments (HAP) contract are included in the assessment of PHA units leased.

**DATES:** Effective: [Insert date 30 days after date of publication in the FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Laure Rawson, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street, SW, Room 4216, Washington, DC 20410, telephone number 202-402-2425.

**SUPPLEMENTARY INFORMATION:**

## **I. Background – Proposed Rule**

On September 23, 2011, HUD published in the Federal Register a proposed rule, at 76 FR 59069, that proposed to revise the process by which HUD measures and verifies performance under the SEMAP lease-up indicator. HUD initiated that proposal to align the SEMAP lease-up indicator with the process for measuring voucher management system leasing and cost data, which by statute must be done on a calendar year cycle.

As provided in the preamble to the proposed rule, the Consolidated Appropriations Act, 2005 (Public Law 108-447, 118 Stat. 2809, approved December 8, 2004) addressed the subject of voucher management system leasing and cost data. The 2005 Consolidated Appropriations Act stated, in relevant part, that “the Secretary for the calendar year 2005 funding cycle shall renew such contracts for each public housing agency based on verified Voucher Management System (VMS) leasing and cost data.” (See 118 Stat. 3295.) Following enactment of the 2005 Consolidated Appropriations Act, the Office of Public and Indian Housing (PIH) issued PIH Notice 2005-1, which provides that “PHAs will receive monthly disbursements from HUD on the basis of the PHA’s calculated calendar year budget.” Since 2005, consistent with the 2005 appropriations act and the implementing notice, and consistent with subsequent appropriations acts, HUD has provided PHAs with renewal funding for their Housing Choice Voucher (HCV) program on a calendar year basis. At the beginning of each calendar year, PHAs are notified of their funding amounts for the calendar year, and they plan their voucher issuance and leasing according to that funding cycle.

As the preamble to the proposed rule further noted, in contrast to the process for measuring VMS leasing and cost data, the SEMAP lease-up indicator continues to measure a PHA’s lease-up rate on a fiscal year basis. The use of a calendar year for renewal funding, while

using a fiscal year system for SEMAP measurements, has resulted in increased complexity for PHAs administering the HCV program and programmatic inefficiency. To eliminate such complexity, and reduce inefficiency in the HCV program resulting from two processes based on different periods of measurement, HUD, through the September 23, 2011, rule, proposed to amend the SEMAP regulations to provide for the SEMAP lease-up indicator to be measured based on a calendar year funding cycle, rather than the existing fiscal year cycle. The September 23, 2011, rule also proposed to clarify that units assisted under the voucher homeownership option or occupied under a project-based voucher (PBV) housing assistance payments (HAP) contract are included in the assessment of PHA units leased. These homeownership units and project-based voucher units have always been included in the assessment, but this is not explicit in current regulations.

## **II. Public Comments on Proposed Rule**

At the close of public comment period on October 24, 2011, HUD received five public comments. The commenters consisted of two individuals, two PHAs and an independent nonprofit institute. With the exception of one of the PHAs, the commenters supported the changes proposed by the September 23, 2011, rule. The two individual commenters expressed their support for the rule without proposing any additional changes, with one of the commenters stating that the change was long overdue. The other two commenters supporting the rule proposed additional changes, and the PHA that did not favor the change appears to have misunderstood some of the program requirements.

In response to public comment, HUD revised the proposed rule at this final rule stage, to clarify what allocated budget authority includes. With the exception of this change, no further

changes were made. The following addresses the comments raised by the latter three commenters.

Comment: The Proposed Change Will Not Increase Efficiency. One of the PHA commenters stated that it is not clear how HUD's proposed regulatory change to the SEMAP lease-up indicator would be beneficial to PHAs, since the financial settlement is due at the end of the PHA's fiscal year. The commenter stated that the proposed rule missed the connection between fiscal year end and utilization. The commenter stated that, as a PHA, it has to track HCVs and funding on a fiscal year basis because it cannot over-utilize unit months at fiscal year end, since it would not be paid by HUD for those months. The commenter stated that by changing this indicator, the PHA will now have to perform double tracking at fiscal year-end for fiscal year-end settlement, and at calendar year-end for SEMAP, which is actually more work, and that all other SEMAP measures would be tracked on a fiscal year basis, creating more complexity and confusion. The commenter stated that the only way this change would be beneficial is if HUD moved the year end settlement for PHAs from fiscal year to calendar year end and moved all the SEMAP indicators to calendar year.

HUD Response: HUD has not required year-end settlement statements from PHAs ever since the issuance of PIH Notice 2006-3 (section 5), which rescinded the requirement to submit form HUD-52681, because the relevant information was being captured in the VMS and Financial Assessment Sub-system.<sup>1</sup> This rescission applied to PHAs with fiscal years ending on or after December 31, 2004. In regard to overutilization, all HUD appropriations acts including and since 2005 have prohibited PHAs from using their renewal funding to support a total number of unit months that exceeds the agency's authorized level of units under contract. Notice PIH

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<sup>1</sup> See [http://portal.hud.gov/hudportal/documents/huddoc?id=DOC\\_8980.pdf](http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_8980.pdf).

2005-1<sup>2</sup> and subsequent funding implementation notices have clarified that over-leasing applies to a calendar year and not a PHA's fiscal year. The Department sees no need to move the measurement period for other SEMAP indicators to a calendar year. They will continue to be assessed by fiscal year to coincide with the current SEMAP cycle.

Comment: PBV Units Should Not be the Only Units Not Counted as Leased for SEMAP Evaluation. The other PHA commenter expressed appreciation for the rule's attempt to clarify the treatment of voucher homeownership units and PBV units in the lease-up indicator, but disagreed that only PBV units that are leased-up should be counted as leased for purposes of SEMAP evaluation. The commenter stated that a PHA has a contractual commitment to provide subsidies to those specific units in one or many PBV projects. The commenter recommended that PHAs have the option to include as "unit-months-leased" all PBV units that are under an Agreement to Enter into Housing Assistance Payment (AHAP) contract or HAP contract, whether occupied or not. The commenter stated that HUD has paid administrative fees for PBV units under contract (as reported in VMS) which, the commenter states, also supports counting them as leased in the SEMAP indicator. The commenter further stated that when a PHA's HCV utilization rate is high, the PHA should "reserve" HCVs so that they will be available when a project under an AHAP is completed and is ready to lease up, and that similarly, a project that is under a HAP contract represents a commitment by the PHA of that many HCVs, so the PHA may need to hold turnover HCVs so they will be available to assist new PBV residents as they qualify and move in. The commenter stated that in both of these situations, the PHA should not be penalized under SEMAP as "underutilized," and all of the HCVs committed under the AHAP or HAP should be counted as leased-up, at the PHA's option.

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<sup>2</sup> See [http://portal.hud.gov/hudportal/documents/huddoc?id=DOC\\_9075.pdf](http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_9075.pdf).

This commenter also stated that HUD should also continue to make allowance for HCVs reserved for AHAP and HAP contacts when calculating renewal funding. The commenter stated that it recognizes that not all HCVs under an AHAP or HAP should be counted as leased for purposes of determining overutilization. HCVs are over-leased when a PHA has more "unit-months leased" over the course of a calendar year than the authorized number of "unit-months available." The commenter stated that for that calculation, HUD should continue to count only those PBV units that are actually leased up, and then allow the PHA to exclude units with "zero-HAP" or fully abated rent. The commenter concluded by stating that SEMAP does not penalize a PHA for HCV overutilization, and the commenter supports continuing that approach.

HUD Response: The purpose of this rule is to change the leasing period from the PHA's fiscal year to the calendar year. The identification of which units are included in the SEMAP leasing indicator was clarified in the proposed rule, not changed. It is not the purpose of this rule to change the type of HCV units included or excluded in the indicator. HUD intends to issue another proposed rule that will more comprehensively address the utilization indicator, as well as other SEMAP indicators. HUD will consider these comments in the development of that proposed rule.

Comment: Clarify Whether HCVs Award for Special Programs Are Included in the SEMAP Lease-Up Indicator. The same PHA recommended that HUD further clarify SEMAP by stating whether HCVs awarded for special programs are or are not included in the lease-up indicator. The commenter stated that many of those programs (most of which were created after SEMAP began) have separate procedures or requirements that reduce the PHA's control over utilization, such as requiring referrals or services from other agencies. The commenter stated that SEMAP should not penalize the PHA if underutilization in those special programs reduces

overall utilization. The commenter stated that it administers the following types of HCVs: regular tenant-based HCVs; HCVs that the PHA has approved for PBV use (about 10 percent of its HCV allocation), disability HCVs (formerly Mainstream), HUD-Veterans Administration Supportive Housing (VASH) HCVs, and Family Unification Program (FUP) HCVs. The commenter requested that HUD advise if these HCVs are to be included in the SEMAP lease-up indicator. The commenter stated that subsidies for Section 8 Moderate Rehabilitation Single Room Occupancy (Mod Rehab SRO) units should not be evaluated under SEMAP, since these units are funded and operated separately from the other Section 8 programs.

HUD Response: The only special purpose HCVs that are excluded from the SEMAP leasing indicator are HUD-VASH HCVs. This exclusion was recorded in the *Section 8 Housing Choice Vouchers: Revised Implementation of the HUD-VA Supportive Housing Program* published in the Federal Register on March 23, 2012, at 77 FR 17086. No other special purpose HCVs have been excluded from the leasing indicator. Again, it is not the purpose of this rule to change the type of HCV units that are included or excluded in the indicator. However, when the broader SEMAP rule is developed, these comments will be considered. No Moderate Rehabilitation program units are included in any indicator under SEMAP.

Comment: Clarify Only New Increments of HCVs in the Assessed Calendar Year Are Exempt from Lease-up Measure. The nonprofit institute commenter stated that under the existing regulations, PHAs are effectively granted a 12-month grace period to lease new HCV increments. The commenter stated that the proposed rule intends to change this blanket 12-month grace period to a variable period and that PHAs would not be held accountable for leasing new HCVs for the remainder of the calendar year in which they are issued. The commenter stated that in exempting units from the baseline, the proposed rule did not clearly distinguish

between renewal funding and ongoing units, on the one hand, and new increments. The commenter suggested that to clearly achieve this purpose, the final rule should modify the last sentence of proposed § 985.3(n)(1), by inserting the word "initially" in the first clause as follows: "Units and funding initially contracted under an ACC during the assessed calendar year.... are not included in the baseline number of voucher units."

The commenter, in further support of this suggested change, stated that the proposed rule strikes a better balance than current policy in that it acknowledges both that the leasing-up of new increments may be delayed for reasons beyond the PHA's control and that the great majority of new HCVs require far less than 12 months to lease up. The commenter further stated that the proposed SEMAP lease-up indicator appears to count all leased HCVs in the numerator, including those from new increments, while excluding those increments from the denominator during the grace period, thereby artificially raising the utilization rate for affected agencies. The commenter stated that shortening the grace period would reduce the effect of this bias, and is also more consistent with HUD's renewal funding policy in recent years that assumes that all tenant protection HCVs can be leased within 90 days of award. The commenter stated that while PHAs receiving new increments in the last quarter of the calendar year would in effect be held to a more demanding standard under the proposed rule, the impact on leasing performance is likely to be small and justified by the simplicity of a clear calendar year-based measure.

The commenter further states that for some types of new HCV awards made near the end of the calendar year, it may be desirable to allow a longer period for initial leasing than allowed under the proposed rule, and that this may be particularly true when PHAs are required to coordinate with service providers before issuing the new HCVs to special populations, such as in the case of VASH or FUP HCVs. The commenter offered that rushing the leasing of such HCVs



may be short-sighted, and undermine the goal of promoting ongoing partnerships between PHAs and service-providing agencies.

The commenter concluded with the recommendation that the final rule allow HUD to exempt, on a case-by-case basis, particular HCV increments from the baseline for an additional calendar year when a longer period for initial leasing would advance the goals of the award.

HUD Response: The Department did not intend, through this rule, to change the period of time that new units are excluded from the utilization calculation. Accordingly, this language is clarified in the final rule. As pointed out by the commenter, to exclude the units just for the calendar year in which they were awarded causes units to be excluded for variable periods depending on the month they are awarded, and such exclusion would unfairly penalize PHAs that receive new allocations late in the assessed year. The Department appreciates the commenter's concerns that a 12-month period may be too long of a period for PHAs to be given to utilize new HCVs. These comments will be considered in the broader SEMAP rule that is currently under development. The Department will also consider the comments regarding the potential need for longer leasing time for HCVs that serve special populations or rely on third-party referrals, as well as granting extensions to certain increments on a case-by-case basis if doing so would advance the goals of the award.

Comment: Exempt Litigation HCV Units and Funding on a Temporary, not Permanent, Basis from the Lease-Up Measure. The nonprofit institute commenter suggested another change to be made at the final rule stage. The commenter stated that the proposed rule is somewhat ambiguous but appears to exempt units and funding obligated as part of litigation from the baseline number of HCVs permanently, and not just in the calendar year of initial issuance. The commenter stated that it is important to provide flexibility in the treatment of litigation HCVs,

because past experience has shown that litigation-related HCV awards can take several years to be fully leased, due to litigation-imposed restrictions on the uses of the HCVs. The commenter stated that a permanent exemption is unnecessary to address this concern, and reduces the incentive to lease these HCVs once barriers have been overcome.

The commenter recommended that HUD provide temporary exclusions from PHAs' HCV baseline, on a case-by-case basis, for litigation HCVs.

HUD Response: While these comments are appreciated, the subject of this rulemaking is only the period of assessment for the leasing indicator. However, HUD will consider these comments in the development of the broader SEMAP rule.

Comment: Determination of Funds "Allocated" Should Include Certain Renewal Funding. The independent nonprofit institute commenter stated that a determination of funds "allocated" should include renewal funding for which PHAs are eligible, after proration, but that is not provided due to an offset of excess reserves (net restricted assets). The commenter stated that in 2008 and 2009, Congress directed HUD to offset renewal funding due PHAs under the prescribed renewal formula by excess unspent funds from prior years. (HUD requires PHAs to hold such reserves in a "net restricted assets" account.) The commenter stated that there is a high likelihood that HUD will be required or would opt to use similar policies in 2012 and future years, and that the premise of such an offset policy is that PHAs will in fact use the offset funds to support HCVs during the calendar year. The commenter stated that to align the measure of lease-up performance with Congressional intent, it is essential that funds offset are included in the determination of "allocated budget authority" that may be used as the denominator in the rating measure.

The commenter recommended that the final rule either should define "allocated budget authority" to include funds offset in determining the calendar year renewal allocation, or should add language regarding the inclusion of offset funds in the denominator of the measure.

HUD Response: HUD agrees that, for purposes of SEMAP, it is important to clarify what is considered in "allocated budget authority." Therefore, the final rule has been revised to clarify what allocated budget authority includes.

Comment: Allow Credit for HCV Set-Aside for Project-Basing. The nonprofit institute commenter recommended that HUD give PHAs credit for HCVs set-aside for project-basing. The commenter stated that PHAs that commit to project-base HCVs in properties that are not immediately available for occupancy may have to reserve all or a portion of the promised HCVs and funding in order not to exceed the authorized HCV cap or available funds when the units become available. The commenter stated that whether a PHA has to "shelve" HCVs to meet project-basing commitments depends on the number of PBVs committed in relation to the size of the PHA's portfolio, its turnover rate, and other factors. The commenter stated that appropriations acts in recent years have recognized this reality by requiring HUD to adjust renewal funding allocations for PHAs that have not used a portion of their HCVs to meet project-basing commitments.

The commenter recommended that the measure of performance for the SEMAP lease-up indicator also should recognize this limited exception, to balance the vital policy of encouraging PHAs to serve the maximum number of families possible with the policy goals of encouraging mixed-income and supportive housing developments.

HUD Response: See HUD's response to the second comment.

### **III. Findings and Certifications**

### Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 et seq.) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. At the proposed rule stage, HUD certified that the proposed regulations would not have a significant economic impact on a substantial number of entities, and that assessment is not changed by this final rule. This rule is directed to increasing administrative efficiencies for PHAs, by aligning the cycle for renewal funding with the cycle for SEMAP measurements. This rule would also provide clarification for PHAs regarding units included in this measure.

### Environmental Impact

This rule does not direct, provide for assistance or loan and mortgage insurance for, or otherwise govern or regulate real property acquisition, disposition, leasing, rehabilitation, alteration, demolition or new construction, or establish, revise, or provide for standards for construction or construction materials, manufactured housing, or occupancy. This rule is limited to the means by which PHAs lease-up rates are measured. Accordingly, under 24 CFR 50.19(c)(1), this rule is categorically excluded from environmental review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321).

### Executive Order 13132, Federalism

Executive Order 13132 (entitled "Federalism") prohibits, to the extent practicable and permitted by law, an agency from promulgating a regulation that has federalism implications and either imposes substantial direct compliance costs on state and local governments and is not required by statute, or preempts state law, unless the relevant requirements of section 6 of the

Executive Order are met. This rule does not have federalism implications and does not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Executive Order.

#### Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538) (UMRA) establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments, and on the private sector. This rule does not impose any federal mandates on any state, local, or tribal government, or on the private sector, within the meaning of UMRA.

#### **List of Subjects in 24 CFR Part 985**

Grant programs - housing and community development, Housing, Rent subsidies, Reporting and recordkeeping requirements.

Accordingly, for the reasons stated in the preamble, HUD amends 24 CFR part 985 as follows:

#### **PART 985 - SECTION 8 MANAGEMENT ASSESSMENT PROGRAM (SEMAP)**

1. The authority citation for part 985 continues to read as follows:

**Authority:** 42 U.S.C. 1437a, 1437c, 1437f, and 3535(d).

2. Revise § 985.3(n) as follows:

#### **§ 985.3 Indicators, HUD verification methods, and ratings.**

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(n) Lease-up. The provisions of this paragraph (n) apply to the first SEMAP certification due after [Insert date 30 days after date of publication in the FEDERAL REGISTER].

(1) The indicator: This indicator shows whether the PHA enters into HAP contracts for the number of the PHA's baseline voucher units (units that are contracted under a Consolidated

ACC) for the calendar year that ends on or before the PHA's fiscal year or whether the PHA has expended its allocated budget authority for the same calendar year. Allocated budget authority will be based upon the PHA's eligibility, which includes budget authority obligated for the calendar year and any portion of HAP reserves attributable to the budget authority that was offset from reserves during the calendar year. Litigation units and funding will be excluded from this indicator, and new increments will be excluded for 12 months from the effective date of the increment on the Consolidated ACC. Units assisted under the voucher homeownership option and units occupied under a project-based HAP contract are included in the measurement of this indicator.

(2) HUD verification method: This method is based on the percent of units leased under a tenant-based or project-based HAP contract or occupied by homeowners under the voucher homeownership option during the calendar year that ends on or before the assessed PHA's fiscal year, or the percent of allocated budget authority expended during the calendar year that ends on or before the assessed PHA's fiscal year. The percent of units leased is determined by taking unit months leased under a HAP contract and unit months occupied by homeowners under the voucher homeownership option, as shown in HUD systems for the calendar year that ends on or before the assessed PHA fiscal year, and dividing that number by the number of unit months available for leasing based on the number of baseline units available at the beginning of the calendar year.

(3) Rating: (i) The percent of units leased or occupied by homeowners under the voucher homeownership option, or the percent of allocated budget authority expended during the calendar year that ends on or before the assessed PHA fiscal year was 98 percent or more. (20 points.)

(ii) The percent of units leased or occupied by homeowners under the voucher homeownership option, or the percent of allocated budget authority expended during the calendar year that ends on or before the assessed PHA fiscal year was 95 to 97 percent. (15 points.)

(iii) The percent of units leased or occupied by homeowners under the voucher homeownership option, or the percent of allocated budget authority expended during the calendar year that ends on or before the assessed PHA fiscal year was less than 95 percent. (0 points.)

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Dated: May 23, 2012

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Sandra B. Henriquez  
Assistant Secretary for Public and Indian Housing

**[FR-5532-F-02]**

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